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No. 04-~~1294~~

IN THE

Supreme Court of the United States

ROSE ACRE FARMS, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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The United States does not contest the existence of deep and lingering confusion over the standards by which lower courts assess Fifth Amendment takings claims. Nor does it address "the difficult, persisting question of what is the proper denominator in the takings fraction," *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001)—the very question that has divided lower courts in this case and led to inconsistent judgments in state and federal courts across the country. The law, in short, is in utter disarray, and the United States does take issue with that fundamental fact. Instead, the United States attempts to discourage this Court from authoritatively resolving the important constitutional questions presented here by pointing to alleged vehicle problems and procedural obstacles. The Acting Solicitor General is wrong. There are no such problems or obstacles. To the contrary, this case arises in a sturdy posture and squarely presents questions that cry out for authoritative resolution by this Court.

1. The United States contends that review is unwarranted "because of the interlocutory posture of the case." Opp. 9. Certiorari would be premature, the argument runs, because the Court of Appeals remanded for additional findings in light of its constitutional analysis. There is no merit to this argument. To begin with, it is essential to recognize that respondent is making a prudential—rather than a jurisdictional—point. Indeed, respondent concedes that this case falls squarely within this Court's jurisdiction, and even seeks review of related questions if the petition is granted. *See* Opp. 9 n.1; Conditional Cross Pet. For Certiorari 7-8.[1]

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[1] The Cross Petition identifies no confusion or division in the lower courts on its single question presented. Nor does it address why that issue is of recurring importance or otherwise warrants this Court's review. Instead, the Cross Petition seeks error correction on an issue that was not dispositive of either decision below. For all of these reasons, the Cross Petition should be denied. Granting the Cross Petition, moreover,

And the petition should be granted. The mere fact that the Court of Appeals remanded for further proceedings—in line with a published 35-page opinion—does not militate against review of a constitutional holding that established the legal framework for remand. As this Court has repeatedly recognized, a remand by a court of appeals is of no moment where the petition presents questions that are "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (internal quotation omitted). *See also Gillepsie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (same); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (same); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

This rule is amply illustrated here. The Federal Circuit vacated a judgment of the Court of Federal Claims after establishing the constitutional framework to be applied on remand. If the Court of Appeals was wrong—and the Court of Claims was right—then this case is over and there is nothing left to decide. Not surprisingly, a substantial portion of this Court's docket—in this current Term as well as any other Term—consists of cases identical to this one; namely, cases in which a court of appeals establishes a legal framework and then remands for further proceedings. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084, *cert. granted*, 2005 WL 349538 (Apr. 18, 2005); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, No. 04-277, *cert. granted*, 125 S. Ct. 654 (2004) *Gonzales v. Raich*, No. 03-1454, *cert. granted*, 124

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would create the chance that the Court's resolution of this case would not clearly resolve the primary question here; namely, the "persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

S. Ct. 2909 (2004).[2]

The United States similarly cannot deny that this Court routinely reviews Fifth Amendment takings challenges after a court of appeals has remanded for further proceedings. As the Court stated in *General Motors Corp.*, in language directly applicable to this case:

> The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. *We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.* The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: "nor shall private property be taken for public use, without just compensation," *which conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs.*

General Motors Corp., 323 U.S. at 377 (emphasis added). *See also United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (review of eminent domain challenge following remand for new trial). At bottom, there is no basis for denying the petition on the primary ground relied on by the United States. This case has now been litigated for more than twelve years. It squarely presents recurring and important constitutional questions that are extensively

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[2] The United States' suggestion that review is unwarranted in this posture is rather odd, because the United States—probably more than any other litigant—routinely urges this Court to grant certiorari in cases (like this one) where the court of appeals has established the "legal framework" for a remand. *See* Reply Br. for the U.S. at 8, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084 (3/29/05) (granted on Apr. 18, 2005); *see also* Reply Br. for the U.S. at 10, *United States v. Olson*, No. 04-759 (2/17/05) (granted on Mar. 7, 2005).

analyzed in two published lower court opinions. This Court has granted review of similar questions arising in an identical posture. And state and federal courts are in disarray on the very questions that the petition presents. Prudence, in sum, counsels *in favor* of certiorari rather than allowing further litigation (and further waste of judicial resources) under an erroneous constitutional standard.

2. The United States argues that the fundamental denominator question should not be reviewed because (in its view) the Federal Circuit correctly included in the takings fraction every Rose Acre farm at which some hen houses were restricted. This argument misses the point. The issue cries out for review not simply because the Federal Circuit was wrong, but also because of the deep and widespread confusion over *how* the denominator itself should be determined. The United States does not contest that the state and federal courts are sharply divided over this issue. Nor could it. As the petition explained, *see* Pet. 10-16, and the amici discuss in great detail, *see* Brief of Amici Curiae Defenders of Property Rights *et al.* 5-12, federal and state courts at every level have applied wildly inconsistent standards to calculate the "relevant parcel" in takings cases. The upshot is dramatically different results for similarly situated property owners. Such a situation is untenable in any legal context, but it is especially so here, where the question goes to the heart of the only constitutional protection that "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *General Motors Corp.*, 323 U.S. at 377.

a. The United States tries mightily to defend the Federal Circuit, but its defense only confirms the need for review. According to the United States, the Court of Appeals properly included Rose Acre's three farms as a whole in the denominator (thereby substantially reducing the economic impact) because (1) all of the hen houses on these farms were technically covered by the USDA regulations and (2) the restrictions themselves increased consumer confidence

and thus increased the sales of unrestricted eggs. *See* Opp. 10-12. Putting aside for the moment that these arguments have little bearing on the suitability of the petition for review, they also totally ignore what actually happened in this case.

The United States contends that the "relevant unit of regulatory oversight," *id.* at 11, is all of Rose Acre's three farms because in addition to restricting the sale of certain eggs, the USDA regulations required "'testing for purposes of monitoring'" elsewhere on the farm. *Id.* (quoting Pet. 21a). The "taking" at issue here, however, is not the incidental burden caused by testing elsewhere but the actual prohibition on sales that destroyed the value of nearly 700 million *healthy eggs*. As the United States elsewhere is at pains to explain, this case involves the regulatory taking of personal property—not real property. The question presented, thus, is whether—as the trial court found—the relevant parcel for the takings analysis should be the *700 million restricted eggs* or—as the Federal Circuit found—those restricted eggs *plus* the billions of other healthy eggs that Rose Acre happened to produce on its farms but the sale of which the USDA never restricted.

Under the trial court's approach, the constitutional inquiry focuses on the government conduct and the character of the restrictions. Under the Federal Circuit's approach, however, the inquiry focuses on the wealth of the property owner, and permits the government to self-characterize its own restrictions in a manner that avoids meaningful scrutiny. Indeed, the government does not explain why the fact that the regulations technically applied to "each farm as a whole" should alter the takings inquiry where there is no dispute that the restrictions *in fact* "applied ultimately to individual [egg producing] houses." Opp. 10-11. Nor is there any sound constitutional basis for such a rule. The takings inquiry should turn on what the government *did*—not on what the government said it would or could have done.

The United States also fails to explain (or cite any authority for) its remarkable proposition that the secondary effects of government regulation—including "increased consumer confidence" in the egg market—should factor into the constitutional inquiry and deflate the true economic impact of challenged government conduct. This argument is both meritless and especially misplaced here—a case that involves the confiscation, restriction, and/or destruction of *healthy and economically viable* private property. If such property is destroyed or restricted to bolster "consumer confidence" writ large, then "in all fairness and justice" the costs of those confiscations and restrictions should "be borne by the public as a whole," not by one private farming business. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (internal quotation omitted). In short, the government's position on the merits confirms the dubious nature of the Federal Circuit's legal analysis—an analysis that finds no support in this Court's precedents, common sense, or the history and purpose of the Fifth Amendment.

b. Recognizing the difficulty of defending the Court of Appeals, the United States falls back on two additional arguments for why "the instant case would be an unsuitable vehicle" for review. *See* Opp. 12. But these arguments are even weaker than the interlocutory point addressed above. First, the United States contends that "the 'parcel as a whole rule' is most often applied in cases involving land-use regulation," *id.*, and, thus, a case involving personal (as opposed to real) property presents an unworthy vehicle for addressing the denominator issue. But this Court has consistently applied the same legal standard to takings challenges involving personal as opposed to real property, *see* Pet. 10 n. 3—which is why the Federal Circuit concluded *as a matter of law* that it was obligated under *Penn Central* and *Keystone Bituminous* (both real property cases) to apply the "parcel as a whole" concept to regulations affecting *only* personal property. The United States itself cites those very precedents to defend the Federal Circuit, *see* Opp. 10,

without ever explaining why those cases would be distinguishable from this one, *see* Pet. 14-15. Accordingly, there is no sound reason for avoiding review merely because this case involves personal property.

On the other hand, however, if this Court's real property cases should *not* apply to a takings challenge involving personal property (as Rose Acre argues and the United States later suggests), then clarification from this Court is long overdue. Amici detail the welter of confusion on this point in the state and federal courts. *See* Amicus Br. 14-17 (citing cases and "highlighting the need for this Court to address this [denominator] issue in the personal property context"). And the absurdity of applying the parcel as a whole rule in the personal property context—which is now the rule in the Federal Circuit, the most important venue for takings challenges—is amply demonstrated by the opinions below. Under the Federal Circuit's rule, the $6 million loss suffered by Rose Acre (and deemed compensable by the trial court) is diluted by whatever other assets Rose Acre happens to own. That is because the "parcel as a whole" directs the court's attention to Rose Acre's "assets as a whole," *i.e.*, billions of eggs that have nothing whatsoever to do with its claim. In other words, because Rose Acre is a successful operation, with several farms and millions of egg-producing hens, its economic loss is substantially diluted, and a taking less likely to have occurred, irrespective of the scope and nature of the *government conduct* that should be the focus of the constitutional inquiry. A smaller egg producer with a single farm and fewer hens, by contrast, would be deemed to have suffered a vast compensable loss even when subject to *identical* government restrictions. *See* Pet. 16; Amicus Br. 17-18. Such a regime has no basis in the Constitution or in common sense.

Additionally, the United States claims that this case is "idiosyncratic" because Rose Acre "presumably experienced a profit on its sales" of non-restricted eggs. Opp. 13. The fact that Rose Acre remained a profitable business, however,

has no relevance to the takings question. Once again, the government is trying to shift the focus away from its own conduct—the imposition of severe restrictions on *healthy and economically viable* private property. Furthermore, its argument on this score invites a perverse incentive structure by which claimants are discouraged from mitigating losses in order to state an actionable takings claim. The record in this case, for example, demonstrates that it was Rose Acre's nimble business acumen that secured financial recovery from the vast economic losses attributable to the confiscation and restrictions of its healthy eggs and hens. *See* C.A. App. 896 (discussing actions taken to avoid going out of business). Such good business practices, however, should have nothing to do with whether government conduct amounts to a taking and entitles a claimant to compensation.

3. The government's objections to the second and third questions presented are equally unavailing. *See* Opp. 14-19.

a. There is no defense for the Federal Circuit's application of *Penn Central*'s character prong, which required Rose Acre to prove that the USDA *knew* its restrictions lacked a scientific basis. *See* Pet. 17-19. The trial court rightly found that those restrictions were based on the hypothesis that SE in a hen environment would necessarily translate into SE in hen-laid eggs—a hypothesis later proved to be wrong and unfounded, thus stripping away the only alleged basis for restricting the sale of Rose Acre eggs. *See* Pet. 7-8, 18. The United States does not explain how such a record satisfies *Penn Central*'s character prong. Instead, it suggests that the character prong serves only to "distinguish[] between cases in which the government appropriates or physically invades private property, and those in which it simply limits the uses to which property may be put." Opp. 14. If that is all the character prong requires, then it is for this Court to say so. As the law presently stands, however, the character inquiry requires challenged action to "substantially advance legitimate state interests" before surviving Fifth Amendment scrutiny.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); *see* Pet. 17-18 (citing cases). The Federal Circuit simply failed to apply that test.

The United States also makes the peculiar argument that there should be no taking because the USDA acted consistent with "established administrative law principles." Opp. 15-16. But the Administrative *Procedure* Act emphasizes the *process* by which an agency makes a decision, not its substantive outcome. The strong presumption of regularity that applies to an agency record, therefore, is irrelevant to the *constitutional* question of what compensation is required after the government destroys the value of private property. As Judge Easterbook explained thirteen years ago—when there *was* an administrative law challenge to the underlying regulations—the APA makes "the Secretary's assessment of the data, not a judge's . . . controlling." *Rose Acre Farms, Inc. v. Madigan*, 956 F.2d 670, 675 (7th Cir. 1992). Such principles have no bearing on a subsequent Fifth Amendment challenge in the Court of Federal Claims. *See id.* at 677 ("How far compensation may be necessary is a legal question . . . for another court").

b. The United States claims this case "presents no question" concerning the proper application of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), because the Federal Circuit "placed no meaningful reliance" on that decision. Opp. 16. But the Federal Circuit explicitly cited *Nollan* and then applied its "nexus test" in a manner that effectively shields government conduct from meaningful scrutiny. *See* Pet. 19-21. Indeed, this vital portion of the Federal Circuit's opinion makes no sense unless the court was relying on and extending *Nollan* outside the limited context of land exactions, an extension that—as the United States concedes, *see* Opp. 16—this Court's decisions flatly prohibit. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999); Opp. 16 ("Rose Acre is correct that the *Nollan/Dolan* standard applies only in the 'special context of land exactions'").

c. The United States contends that the categorical seizure and destruction of more than 6,000 *healthy hens* was properly reviewed as a regulatory taking under *Penn Central*. *See* Opp. 17-19. But its analysis misstates the record and draws an inapt analogy to the heavily regulated pharmaceutical industry. On the record, the United States claims a sample of the hens "tested positive [for SE]." Opp. 18 (brackets in Opp.) (citing C.A. App. 949). The brackets, however, add information that is nowhere in the record. Very few of the confiscated hens tested positive for SE, which is one of the chief reasons the trial court ordered compensation for their outright destruction. The record citation (C.A. App. 949) provides only that *some* hens tested positive for *some* forms of salmonella (of which there are 2,000 strains) not the far more serious and regulated strain of SE. There has *never* been a showing that the hens for which the trial court awarded compensation tested SE positive.

Similarly, the analogy to the heavily regulated pharmaceutical industry is totally inapt. Prior to the regulations at issue here, the *only* federal regulation governing egg production dealt with grading standards. *See* Pet. 64a. Both lower courts in fact concluded that Rose Acre enjoyed an investment-backed expectation to sell its healthy eggs as table eggs in interstate commerce and that the USDA regulations were not foreseeable. *See* Pet. 22a-23a, 64a-65a.[3] Thus, the suggestion that review may intrude on regulation of the drug industry lacks merit and should not bear on the certworthiness of the third question presented.

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[3] Equally misplaced is the United States' reliance on cases involving the destruction of *diseased* property—such as infected trees—to "prevent contagion." Opp. 17-18 (citing *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (trees were destroyed to "prevent[] the communication of a rust or plant disease *with which they were infected*") (emphasis added)). The only issue here is the seizure and destruction of *healthy egg-laying hens*. There has never been a showing that these slaughtered hens (in contrast to the cedar trees in *Miller*) were a threat to anything or anyone.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and in the Brief of Amici Curiae, this Court should grant a writ of *certiorari*.

Respectfully submitted,

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